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ABSTRACT

This paper stresses the outdoor recreation and education professionals should understand aspects of liability, negligence, and risk management. There are four elements that must be present if a person or organization is to be considered negligent: the presence of a legal duty of care, a breach of duty, proximate cause, and actual damages. When determining the legal duty of care, it is necessary to define the relationship between the property owner and the person pursuing a recreational activity. A person who enters property to pursue a recreational activity may be an invitee, a licensee, or a trespasser. From a legal standpoint, the recreational landowner owes the highest standard of care to the invitee and owes no standard of care to trespassers. A legal defense that is used frequently in outdoor recreation litigation is that of assumption of risk. This defense can only be used when the outdoor recreationists have been made aware of risks involved, understand and appreciate their nature, and freely choose to incur a particular risk. A signed agreement to participate should be obtained to record that each participant is aware of the inherent risks involved in a recreational activity. This document should include a detailed description of the activity, injuries that may result from participation, safety rules, and emergency procedures. Equally important are the development and implementation of a risk management program. Components of a risk management program include identifying and evaluating the risks involved in a recreational activity, taking necessary steps to reduce the frequency and severity of injuries associated with a particular activity, purchasing insurance to cover high risk activities, and continuously evaluating and updating the program. (Contains 12 references.) (LP)

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An Examination of Negligence, Assumption of Risk, and Risk Management in Outdoor Recreation

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Abstract

Negligence litigation is an ever present concern of the outdoor recreation provider. This paper examines the elements of negligence, including the presence of duty, breach of duty, proximate cause, and actual damage. The use of assumption of risk as a legal defense and the components of a risk management program are also discussed.

Introduction

Outdoor recreation and education professionals expose their students or clients to risks on a common basis. The nature of most activities involved will provide some degree of inherent danger. In fact, many times risk is seen as a motivator to participate in a particular recreative activity. However, the old adage "play at your own risk" is at best only partially applicable. The public has the legal right to expect that the recreation activity they select will be provided in a well planned, safe environment (Gold, 1994).

The litigious nature of our society reflects the need for outdoor recreation and education professionals to be cognizant of issues involving legal liability, negligence, and risk management. A through knowledge of these topics and how they apply to particular areas of outdoor recreation will allow for a safer, reduced risk environment, fulfilling the participants desire to experience a risk activity.

Negligence is a common topic among providers of outdoor recreation and education. The fear of litigation, along with the possibility of staggering financial losses to the individual or organization is a valid concern in today's marketplace. In the past, if an individual was injured, it was blamed on a lack of personal skill or merely as an unfortunate accident. In most cases the person accepted responsibility for his or her own injuries. This has changed. As participation in risk activities continues to increase, there is the possibility for an increase in accidents and injuries. Persons who are injured today are less likely to accept personal responsibility. These individuals many times consider themselves to be victims. Improper teaching techniques, damaged or improper equipment selection and usage, unsuitable facilities, poor supervision, and failure to warn of the risks involved in an activity are all examples of accusations brought against recreation providers.

How can an organization or individual protect against being the target of negligence litigation? The foundation of this answer lies in being familiar with the legal concept of negligence. It is critical to take note that a basic understanding of various legal concepts in no way qualifies an individual to make important decisions regarding negligence issues facing an organization. Soliciting the advice of legal counsel is paramount in all legal matters.

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Negligence is the failure to act as a reasonable and prudent person would act under similar circumstances. Negligent behavior can also be the omission of an act that a reasonable and prudent person would have performed. Negligent conduct has also been defined as behavior which falls below the standards established by law which provide for the protection of others against unreasonable harm (Clement, 1988). For example, in a recent Illinois case, the defendant was charged with not warning that an area was unsafe for swimming and not providing appropriate supervision for such a dangerous area (Hoye v. Illinois Power Company, 1995).

There are four elements that must be present in order to prove that a person has acted in a negligent manner. The first is a legal duty of care. The outdoor recreation professional has a legal duty to provide individuals with an activity environment that is as safe as possible. This does not mean that all risks must be eliminated from the program. However, it does mean that only the inherent risks of the activity remain, not extraneous dangers. For example, in a recent California case (Morgan v. FUJI Country USA, Inc., 1995) a person was injured after being struck in the head by a golf ball hit from an adjacent teeing area. Morgan, the plaintiff, may have assumed the risk of being struck by a golf ball while playing golf. However, Morgan's claim stated that the golf course, by removing a tree, had failed to perform its legal duty to provide a safe environment, and was therefore liable for his injuries. The court system has universally agreed that a determination of negligent conduct is made by comparing the actor's actions against the conduct of a hypothetical ordinary, reasonable, and prudent person under similar circumstances (Kaiser, 1986). In this particular case, the legal question was whether or not the country club management acted as other golf course management personnel would have acted under like circumstances. In practically all cases, the recreation provider will owe a legal duty or standard of care to his or her students or clients.

If it is established that a person or organization owes a duty to an individual, the second element of negligence is examined. This element is a breach of the legal duty that was present. It must be shown that an action or omission of an act breached the legal duty owed to the injured party. In a Wisconsin case, a snowmobile club and snowmobile trail grooming organization were accused of breaching their legal duty to properly maintain and mark the trail system used by recreational riders (Smith v. Sno Eagles Snowmobile Club, Inc, 1986).

The third element of negligence that must be present is proximate cause. This means that the direct action or inaction of the recreational professional was the cause of the accident and subsequent injury. Stated differently, would the injury or accident still have occurred despite any negligent act? Proximate cause is determined by examining whether or not the injury sustained should have been reasonably foreseeable to the recreation provider (Clement, 1988).

The final element of negligence is actual damage. In order for a person to be considered negligent, an injury must have occurred as a result of the breach of the legal duty. This injury must be severe enough in nature as to render the person incapacitated in some manner (Clement, 1988). This point is sometimes an issue of fact that requires the jury to make a decision. These four items: Presence of a duty, breach of duty, proximate cause, and actual damage must all be present if a person or organization is to be considered negligent.

The relationship between the property owner and the user must also be considered when determining the standard of care owed to a person pursuing a recreational activity. Those persons or organizations who are in possession of recreational land can be held liable for injuries occurring on that property. There are generally three classifications of persons who enter

property for the sake of pursuing a recreational activity, with each classification requiring an appropriate standard of care from the landowner. The first classification is the invitee. The recreational landowner owes the highest standard of care to this group. An invitee is a person who has been expressly or implicitly invited onto the land, for most commonly, economic benefit to the land possessor (Clement, 1988). However, is some cases, the economic motive does not have to exist for the invitee relationship to occur. The public, at large, is deemed to be an invitee on the majority of recreation use lands. If a person is considered to be an invitee, the landowner must maintain the recreational property in a safe manner and provide both verbal and written notice of any artificial or natural hazard that may exist.

The second type of relationship that can exist between a landowner and recreational user is termed a licensee. A licensee is an individual who has received permission to enter onto the land for recreational purposes, however, there is no economic benefit sought by the land possessor. For example, a person , with permission, enters onto private land for the purpose of fishing on a farm pond. Even if the landowner has not given permission to the individual, but allows the activity to continue, the licensee relationship is established. The major difference between the invitee and the licensee is that with the licensee, the possessor of the land must warn of only the dangers that are known to him or her. An invitee would require a more through inspection of the premises to be certain that all possible risks had been made known to the user.

The final classification requiring a standard of care is that of the trespasser. A trespasser is an individual who enters onto private property without permission from the landowner. An important concept to remember with trespassers is that the landowner must not be aware of their presence. For example, if a person entered onto private property for the purpose of hunting, and the landowner was aware and made no attempts to stop the activity (no trespassing signs or verbally asking the person to leave the property) the person would be considered a licensee. The property owner can not create an unexpected hazard that could result in injury to the trespasser. If a person is indeed considered to be a trespasser, the property owner owes no standard of care to that individual, with the exception of the created hazard (Briney v. Illinois Central Railroad Co., 1948). The issue of age is once again critical when examining trespassers. If the condition of the land presents an attraction to minors, the landowner will be legally responsible for taking measures to protect the minors from injury. The possessor of the land is said to be liable under the laws of attractive nuisance. The following example will illustrate attractive nuisance and how it may be applied.

In a wrongful death case in Illinois, a six-year-old girl drowned in her neighbor's above ground swimming pool (Henson v. Ziegler, 1995). The pool had an aluminum ladder which could be raised and lowered for access. On the night in question, the defendant forgot to put the ladder in the "up" position and as a result, the girl accessed the pool early the next morning and subsequently drowned. The defendants stated that the pool should be considered an obvious danger such as a lake or river, therefore no duty was owed to those who gain entry through trespassing. It was decided in the case that a pool is not an obvious danger to a six-year-old child. In fact, parents encourage children to enter swimming pools where they would not be encouraging towards other bodies of water. In this particular case, the original decision in favor of the defendant was reversed and remanded for further proceedings.

The outdoor recreation professional has some options for defense when named in a negligence suit. One of the defenses that is many times used in outdoor recreation litigation is that of assumption of risk. When a person chooses to swim in a lake, rappel from a rock cliff, jump from a bungee tower, or simply sit in a swing on the local playground there are inherent risks that are

present. The outdoor recreation provider must not assume the visitors who enter an area of their own free will assume the risks of that particular area (Jubenville, 1993). The defense of assumption of risk can be used only when the participants: Know the risk exists, understand and appreciate the nature of the risk, and freely choose to incur that particular risk (Clement, 1988). It is important to consider the age and experience levels of the participants in determining their ability to comprehend the risks involved in a recreational activity. Children must be held to a higher standard of care than a person of majority age.

Keeton (1984) examined assumption of risk from three perspectives. The aspect most used in recreation litigation is express consent. This is when the plaintiff, in advance of the activity, has given consent to remove any liability from the recreation provider, and has agreed to take the chances of incurring an injury from the known risks of that particular activity. It is a common practice of outdoor recreation providers to require that participants agree in writing to assume all the risks of an activity and thereby release the organization or individual from liability (Kaiser, 1986). These written documents take on many different names and appearances. Waivers, release forms, permission slips, and parental consent forms are the most common mentioned. From a legal standpoint, a release is a voluntary relinquishment of a claim, right or privilege by an individual to someone against whom it might be enforced (66 Am.Jur.2d, Releases 1). These documents have been ridiculed by many as "not being worth the paper they are printed on." This argument is based on the fact that a person can not be legally released from a negligent act he or she committed, regardless of signed documents. Many outdoor recreation providers are incorrect in assuming that when a person signs a waiver or release for it removes all liability from the organization. For example, a recreational softball league requires all participants to sign a release form before the first game of the season. Midway through the schedule, a player is injured because of a surveyor's stake that had been placed in left field. The softball organization will most likely be unsuccessful in attempting to use the assumption of risk defense in this case. In this example, the reasonable and prudent field supervisor would have inspected the playing area for possible hazards before the initiation of play. When signing the release, the player was only agreeing to accept those risks that are an inherent part of the game.

The waiver or release form is not however an item that should be deemed useless. These documents can be very productive in the event of litigation because they may indicate that an injured party was, at the very minimum, aware of the risks that were associated with that particular activity. The wording of this document is critical if it is to be useful when implemented as a defense. Initially, the name of the document needs to be changed. Since negligent conduct can not be waived or released, these terms serve no purpose but that of confusion to the injured party, or perhaps a prospective jury. A common term used today is the agreement to participate. The agreement to participate must be worded very explicitly, with no confusion regarding any terminology. Any activities that students or clients will be participating in must be explained in detail, along with the injuries that can occur through participation. Any safety rules that are to be followed must be listed and explained, as well as any emergency procedure plans that have been formulated (Clement, 1988). After the agreement to participate is signed by the participant it should be filed in the event litigation should arise in the future. It is important that the agreement to participate be examined by an attorney prior to implementation by the recreational organization.

It is evident that outdoor recreation and education professionals must be prepared to deal with risks. The nature of the risks will depend upon the type of activities that are offered. The process of identifying potential risks and implementing strategies to reduce the likelihood of those risks causing personal injury is called risk management. The size and type of the

organization will determine the most suitable risk management strategy. Some facilities may have outside consultants evaluate their programs, where others may assign this duty to an on-site administrator. Regardless of the method, the goal is the same. Risk management programs are designed to reduce the frequency and severity of injuries, as well as reduce the chances of undue financial burdens being placed on the organization as a result of litigation.

The first step when implementing a risk management program is to identify the risks. A comprehensive examination of all aspects of the recreation program must be conducted in order to identify all possible dangers. For example, do safety inspections of the facility and equipment used in the activity take place at regular intervals? Is this information documented? How are repair requests make and prioritized? Are participation waivers or agreements to participate properly worded and implemented? Questions such as these will aid the program administrator in locating potential liability risks in the organization.

Once these risks are identified, they must be evaluated according to frequency and severity. Each risk is examined with regard to how many times (frequency) an injury is likely to occur in that particular risk area. Severity refers to the degree of injury that is usually suffered in the event of an accident in that particular risk area. For example, examine the frequency and severity of playground injuries versus swimming pool injuries (Kaiser, 1986). There are many more injuries that occur on a playground when compared to a pool, however, the extent of these injuries is rarely critical. Therefore, playgrounds have a high frequency for accidents, but a low severity level. In comparison, swimming pools will have fewer accidents (lower frequency), but the severity of the injuries (drowning) is extreme. A similar analysis of each risk area should be completed.

Once each risk is evaluated, the recreation administrator must make decisions regarding each activity. According to Kaiser (1986), there are three general options available to the risk manager. The first of these is risk avoidance. It is generally agreed upon that this is not an acceptable practice in the area of recreation (Van der Smissen, 1979). The removal of an activity will however eliminate the possibility of injury and financial loss. The decline of trampolines in recreation programs and the removal of diving boards are examples of the legal liability outweighing the perceived benefits of these pieces of equipment.

The second option available to the risk manager is that of risk acceptance and reduction. Risk acceptance involves the organization having the knowledge that a risk exists and with that knowledge, assuming the risks that are associated with a particular activity. This coupled with risk reduction is a viable alternative for the outdoor recreation provider. Risk reduction includes active involvement on the part of all personnel in identifying and taking necessary steps to reduce both the frequency and severity of injuries that may occur. The strategy of implementing risk acceptance and reduction would be desirable in situations where the potential risk frequency is low to moderate and the severity of the risk area is low.
Activities that involve the potential for catastrophic injury should be placed into the third category.

With these high risk activities, the recreation provider should examine the possibilities of transferring the risk to an outside agency. In most cases, this entails the purchase of insurance. Insurance is the keystone of most risk management programs (Kaiser, 1986). There are a multitude of insurance selections available to the outdoor recreation provider. Determining which policy is best suited to a particular organization can be a laborious and confusing task. It is recommended that an insurance provider be consulted with regards to individual needs.

The final stage of the risk management program involves continuous evaluation and updating of the program. The recreation provider must remain current on not only new advances in equipment and teaching techniques, but also changes that occur in the local and state legislation regarding negligence.

The popularity of outdoor recreational pursuits is increasing on an annual basis. Persons are willing to spend larger sums of money to participate in risk taking experiences. It is the duty of the recreation professional to provide an environment where extraneous risks have been reduced or eliminated. By taking a proactive approach to risk management, both the provider and user will benefit.

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